IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1958

No. [redacted] 48

CITY OF TALLAHASSEE, A MUNICIPAL CORPORATION ORGANIZED UNDER THE STATE LAWS OF FLORIDA,

Petitioner,

v.

OLAN MILLS INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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CITY OF TALLAHASSEE, A MUNICIPAL CORPORATION ORGANIZED UNDER THE STATE LAWS OF FLORIDA,

Petitioner,

v.

OLAN MILLS INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered in the above styled cause on January 22, 1958. Petition for re-hearing denied on February 28, 1958.

OPINIONS BELOW

The memorandum decision and final decree of the Circuit Court of Leon County, Florida (R. 43-46) is unreported but appears as Appendix A to this petition. The opinion of the Supreme Court of Florida (R. 59-63) is reported in 100 So. (2d) 164 (Advance Sheet 100 So. (2d) No. 2), and appears as Appendix B to this petition.

JURISDICTION

Petitioner seeks to have this Court review the judgment of the Supreme Court of Florida which reversed the judgment of the Circuit Court of Leon County, Florida; the Supreme Court of Florida holding that an ordinance of the petitioner imposing an annual occupational license tax in the amount of $25.00 upon a photographer or cameraman, whether resident, non-resident, transient or itinerant, or those taking photographs by exposure, and an annual occupational license tax of $15.00 upon a salesman or solicitor for any photographer or cameraman, whether such salesman or solicitor be resident, non-resident, transient or itinerant, and who solicits orders from the general public for the taking of photographs or exposures therefor through the sale of coupons, tokens or other similar device for a valuable consideration or for which an advance deposit of money is paid or delivered to such salesman or solicitor, was, as applied to a cameraman who sent negatives, upon which the exposures were taken, to Tennessee to be developed and finished, in violation of the Commerce Clause of Section 8 of Article I of the Constitution of the United States.

The judgment of the Supreme Court of Florida was entered on January 22, 1958, (R. 65) and Petition for rehearing was denied on February 28, 1958 (R. 70).

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED

1. Is a cameraman, who takes mechanical exposures for photographs within a municipality and subsequently transmits the exposures to another state for chemical development and printing into photographic proofs for the selection by the subjects of the cameraman's exposures for ultimate printing of photographs, engaged in interstate commerce, and therefore immune from a municipal occupational license tax.

2. Is a municipal occupational license tax imposed upon intrastate and interstate commerce equally, and without discrimination and in a nominal amount, a burden upon interstate commerce.

Constitutional Provisions and Ordinances Involved

Third Clause of Section 8 of Article I of the Constitution of the United States providing the Congress shall have power:

> "To regulate Commerce with foreign Nations, and among the several States, * * * ."

The Tenth Amendment to the Constitution of the United States providing:

> "The powers not delegated to the United States by the Constitution nor prohibited by it to the States,

are reserved to the States, respectively, or to the people."

Section 32-14, Code of the City of Tallahassee, Florida, 1951, and Item 186 of said section providing:

"Sec. 32-14. Amount of tax to be paid.

The amount of occupational license taxes levied and imposed upon every person that shall engage in or manage any business, profession, privilege or occupation hereinafter mentioned within the city is hereby fixed, graded, determined and imposed at the following rates or amounts:

. . . . . .

"186. PHOTOGRAPHERS OR CAMERAMAN, whether resident, non-resident, transient or itinerant, or those taking photographs by exposure or engaged in portrait enlarging, copying, coloring or finishing, or ferotypers and crayon artists 25.00

In addition to the license fee hereinabove provided for there is hereby levied and imposed upon every person engaged in the occupation of a salesman or solicitor for any photographer, cameraman or other person engaged in the business of portrait enlarging, copying, coloring or finishing, ferotyper or crayon artist, whether such salesman or solicitor be resident, non-resident, transient or itinerant and who solicits orders from the general public for the taking of photographs or exposures therefor, the enlargement, copying, coloring or finishing of portraits or crayon sketches through the sale of coupons, tokens or other similar device for a valuable consideration or for which an advance deposit of money is paid or delivered to such salesman or solicitor, and occupational license fee of fifteen dollars per annum, or any fraction thereof, that such salesman or solicitor shall engage in such activity within the city. Such license shall not be transferable. (R. 5-6)

STATEMENT OF THE CASE

The respondent on February 6, 1952 filed its complaint, and on February 22, 1952, an amendment thereto, in the Circuit Court of Leon County, Florida, seeking an injunction against the petitioner, City of Tallahassee, to restrain and enjoin the enforcement of Section 32-14 and Item 186 of said section of The Code of the City of Tallahassee, Florida, 1951, against the agents, to-wit: cameraman and solicitors of respondent and to enjoin its enforcement against the respondent itself upon the ground that said sections of the Code of the petitioner imposed a tax upon the franchise or privilege of engaging in interstate commerce (R. 2-10 and 16-17).

To the complaint and amendment the petitioner filed its answer and amendment thereto (R. 11-15 and 20) denying that the license tax imposed upon the cameraman and the solicitors for exposures by the cameraman constituted an undue burden upon interstate commerce; and further alleging that the occupation of the cameraman is such requiring skill or artistry in taking proper exposures for the ultimate production of photographs of good quality, and that the occupation of the solicitor soliciting orders from the general public for exposures for photographs through the sale of coupons, tokens or other similar device for a valuable consideration or for which an advance deposit of money is paid is a commercial activity which by its nature and method of conduct may readily lend itself as an instrumentality of fraud and deception upon the public and; that therefore, such activity or occupation of the solicitor is a fit subject for regulation by the petitioner, City, in the exercise of the police power reserved to the State of Florida under the Tenth Amendment to the Constitution of the United

States, and granted by the State of Florida to the petitioner, City of Tallahassee.

A motion to dismiss the complaint incorporated in the answer of the petitioner raised the same Federal Constitutional questions as set forth in the petitioner's answer. (R. 15)

Upon the pleadings the trial Court entered a temporary injunction (R. 22-23), and petitioner and respondent entered into a stipulation and agreement as to certain facts and a stipulation as to the testimony of an officer of the respondent and an officer of the petitioner. (R. 31-41)

Upon the pleadings and stipulated evidence the trial Court, the Circuit Court of Leon County, Florida, entered a final decree dissolving the temporary restraining order and dismissed the suit. (R. 43-46)

Upon appeal to the Supreme Court of Florida, the judgment of the Circuit Court of Leon County was reversed and the ordinance imposing the respective license taxes upon the cameraman of the plaintiff and the solicitors for orders for exposures to be taken by the cameraman was held invalid as in violation of the Third Clause of Section 8 of Article I of the Constitution of the United States. (R. 59-63)

Petition for rehearing was filed January 31, 1958, and denied by the Supreme Court of Florida on February 28, 1958. (R. 67-70)

The pleadings and evidence as stipulated show the following: That respondent, a Tennessee corporation of Chattanooga, Tennessee, is engaged in the business of photog-

raphy and conducts its business as follows: Under the direct supervision of its home office an advance sales unit composed of solicitors solicits orders in a municipality for exposures to be taken in the municipality for photographs for future delivery after processing and finishing in Chattanooga, Tennessee. At the time an order is taken an advance deposit of fifty cents is collected, which is retained by the solicitor as part of his compensation; the customer is given a receipt and notified when and where to appear for a "sitting" or "exposure." The order is then delivered to the traveling cameraman, an employee under the direct supervision of the respondent, who takes the "sitting" or "exposure" and collects an additional fifty cents as final payment therefor. For the one dollar payment the customer is entitled to receive an unmounted photograph from a proof which is selected by him. The order, the exposed negative together with the fifty cents deposit are then sent to the home office of the respondent in Chattanooga, where the order is accepted or rejected, and if rejected the total payment of one dollar is returned to the customer. The negatives are developed, processed and the proofs manufactured at the home office of the respondent. The proofs are then sent to another traveling representative of the respondent in the municipality who is under the direct supervision of the home office of the respondent. The customer is then notified by mail from the home office of the respondent to meet with its traveling representative for the purpose of selecting the proof for the picture for which the customer has paid and for ordering additional pictures should he so desire. The traveling representative then sends by mail to the home office of the respondent the proof selected by the customer and the picture processed from the proof is mailed to the customer. If no additional pictures are ordered the fifty cents pay-

ment made at the time of the "sitting" or "exposure" constitutes final payment for the one picture received by the customer. In the event the exposures are not satisfactory to the respondent the one dollar payment is returned to the customer and if the exposures are not acceptable to the customer a credit memorandum is issued to him and further exposures will be made on the next trip of the cameraman to the municipality.

That respondent in its operation in the petitioner municipality has an advance sales unit of approximately four solicitors taking orders for a period of from three to four weeks; that thereafter the cameraman spends about one week in the municipality taking exposures of persons from whom orders have been solicited, and then another representative of respondent spends about a week in the municipality for the purpose of submitting proofs to customers. That the operation of the respondent as outlined takes place in the municipality on the average of three times each year.

That the taking of an exposure by respondent's cameraman is "a purely mechanical process and in the case of an exposure taken in Tallahassee that mechanical process is entirely completed in Tallahassee." (R. 34-35)

That respondent has had experience with some of its solicitors who have accepted deposits for exposures, issued receipts therefor and then vanished without delivering them to the respondent and that while respondent always honors such receipts it does not know whether or not other companies engaged in the same business as respondent have had the same experience with their representatives but would guess that they have; and that respondent is

without knowledge as to the policy of competing companies with reference to making good the misrepresentations of their solicitors. (R. 36)

Manner in Which Federal Questions Were Raised and Disposed

The respondent raised the question of the invalidity of petitioner's ordinance imposing the respective occupational licenses upon its cameraman and solicitors in the Circuit Court of Leon County, the Court of first instance, in its initial pleading, the complaint, contending that its activities constituted interstate commerce and that petitioner's ordinance imposed an undue burden on such commerce. (R. 7)

Petitioner in its answer and motion to dismiss incorporated therein, its initial pleading in the Circuit Court, the Court of first instance, denied that respondent's activities constituted interstate commerce or that the occupational license tax imposed an undue burden on such commerce (R. 12-13); and defended the validity of the ordinance and tax as a valid exercise of the police power granted to it under the Constitution and laws of the State of Florida and reserved to the State of Florida under the Tenth Amendment to the Constitution of the United States. (R. 13-14)

The Circuit Court in its final decree dismissing the suit (R. 43-46), Appendix A, specifically passed upon the federal questions raised by holding that the ordinance of petitioner was non-discriminatory, imposed a tax upon purely a local activity carried on or conducted entirely within the corpo-

rate limits of petitioner and did not constitute an undue burden on interstate commerce.

Respondent in its grounds of appeal to the Supreme Court of Florida (R. 49) specified that the Circuit Court erred in holding that the license taxes sought to be imposed by petitioner did not unduly burden interstate commerce.

The Supreme Court of Florida in its opinion reversing the decree of the Circuit Court held the ordinance invalid as to respondent "as an attempt to place a direct tax upon the privilege of engaging in interstate commerce." (R. 59-63), Appendix B.

Reasons for Granting the Writ

1. The Supreme Court of Florida has decided a Federal question of Substance, which Decision is not in accord with Applicable Decisions of this Court.

A. The decision of the Court below is in direct conflict with the decisions of this Court in the cases of *Oliver Iron Mining Company v. Lord*, 262 U.S. 172; *Utah Power & Light Company v. Pfost*, 265 U.S. 165; *Coverdale v. Arkansas-Louisiana Pipe Line Company*, 303 U.S. 604; *McGoldrick v. Berwind-White Coal Mining Company*, 309 U.S. 33; *Caskey Baking Company v. Virginia*, 313 U.S. 117; and *Interstate Oil Pipe Line Company v. Stone*, 337 U.S. 662. In the cited cases the principle was clearly established that a state or city may tax a local activity and especially one of a mechanical nature although directly connected with prior or subsequent transmission in interstate commerce.

In the instant case the respondent admitted "That the taking of an exposure by plaintiff's cameraman is a purely

mechanical process, and in the case of an exposure taken in Tallahassee that mechanical process is entirely completed in Tallahassee * *." (R. 34-35)

B. The decision of the Court below is in direct conflict with the decisions of this Court in the cases of ***Memphis Natural Gas Company v. Stone***, 335 U.S. 80, and ***Braniff Airways v. Nebraska State Board***, 347 U.S. 590, holding that the Commerce Clause does not immunize interstate commerce from all state taxation, but that such commerce may be required to pay a non-discriminatory share of the tax burden.

The respective occupational license taxes of which respondent complains are imposed upon all alike and upon activities that take place entirely within the corporate limits of petitioner.

C. The Court below, in predicating its decision upon the premise that all contracts pertaining to its activities within the corporate limits of petitioner were entered into beyond the borders of the State of Florida, disregarded the holding of this Court that the mere formation of a contract between persons in different states is not within the protection of the Commerce Clause. ***Western Live Stock v. Bureau of Revenue***, 303 U.S. 250.

D. That the nature and method of conduct of the activities of the respondent's cameraman and its solicitors for exposures to be taken by the cameraman through the collection of advance deposits is a commercial activity which as conceded by respondent (R. 36) may readily lend itself as an instrumentality of fraud and deception upon the public and therefore a proper subject for regulation by

taxation in the exercise of the police power reserved to the states under the Tenth Amendment to the Constitution of the United States.

2. The Supreme Court of Florida has decided a Federal Question of Substance not heretofore Determined by this Court.

A. Settlement of the question of the constitutionality of petitioner's ordinance and license taxes imposed thereby is clearly in the public interest in view of the conflicting decisions on the question between the decision of the Court of Appeals for the Fourth Circuit in *Lucas v. Charlotte*, 86 Fed. (2d) 394, and the decisions in the cases of *Craig v. Mills*, 203 Miss. 692, 33 So. (2d) 801, and *Graves v. State*, 258 Ala. 359, 62 So. (2d) 446, on the one hand, upholding the constitutionality of license taxes almost identical to that imposed by petitioner, and the decisions on the other hand of the state courts in the cases of *State v. Mobley*, 234 N.C. 55, 66 S.E. (2d) 12; *Warren Kay Valentine Studio v. City of Portsmouth*, 95 N.H. 171, 59 Atl. (2d) 475; *Graves v. City of Gainesville*, 78 Ga. App. 186, 51 S.E. (2d) 58, *Nicholson v. City of Forest City*, 216 Ark. 808, 228 S.W. (2d) 53; *Cordell v. Commonwealth (Ky.)*, 254 S.W., (2d) 484; *Bossert v. City of Okmulgee, Okl. Cr.*, 260 Pac. (2d) 429, *Olan Mills, Inc., v. City of Cape Girardeau (Mo.)*, 272 S.W. (2d) 244, and the instant case holding such license taxes to be in violation of the Commerce Clause.

In view of the litigation on this question over the past twenty years evidenced by the decisions cited above, the question should be settled once and for all by this Court so that the states and municipalities on the one hand and those engaged in activities similar to the respondent might definitely know of their respective rights upon the subject.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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Tallahassee, Florida;
Counsel for Petitioner.

April 1958

APPENDIX A

C.O. 60 page 397

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA. IN CHANCERY.

OLAN MILLS INCORPORATED, Plaintiff, vs. CITY OF TALLAHASSEE, a municipal corporation organized under the state laws of Florida, Defendant.	No. 12111. Recorded in the Public records of Leon Co. Fla. in the book and page Ind. Aug. 9, 4:11 p.m. '56 at the time and date noted Geo. G. Crawford Clerk of Circuit Court.

FINAL DECREE

This cause coming on for final hearing upon the complaint of the plaintiff, as amended, the answer of the defendant as amended, the stipulation as to testimony entered into by and between counsel for the plaintiff and the defendant on the 17th day of August, A. D. 1955, and the stipulation and agreement between counsel for the respective parties entered into on the 12th day of September, A. D. 1955, and the Court being now advised of its opinion in the premises, does find:

1. That the respective license taxes imposed upon photographers or cameramen and the salesmen or solicitors complained of by the plaintiff are non-discriminatory license taxes and are imposed upon residents, non-residents, transients or itinerants so that the question of discrimination is not involved in this case.

2. That the tax imposed upon a photographer or cameraman is a tax upon purely a local activity carried on or con-

ducted entirely within the corporate limits of the defendant, City of Tallahassee, and that such activity on the part of a cameraman, according to the stipulated testimony of the secretary of the plaintiff corporation, is a "purely mechanical process" which is entirely completed in the City of Tallahassee.

3. That the orders solicited and taken by the salesman or solicitor for the photograph or exposure are completed within the corporate limits of the defendant city and the initial payment or deposit made to the solicitor and the final payment made to the cameraman are all consummated entirely within the corporate limits of the city.

As to findings numbered 2 and 3, see

Lucas v. Charlotte (CCA 4)
86 Fed. (2) 394

in which the Court in upholding a similar ordinance imposed by the City of Charlotte, North Carolina, said:

> "The record shows that here the orders are gotten, payment received, and the picture or photograph actually taken all in the City of Charlotte. We do not think that the fact that the negatives of the photographs, after the taking, are sent away to Minnesota to be finished, makes the transaction one of interstate commerce.

See also

Interstate Oil Pipe Line Company v. Stone
337 U. S. 622, 93 L. Ed. 1613

Western Livestock v. Bureau of Revenue
303 U.S. 250, 82 L. Ed. 823

and

Utah Power & Light Company v. Pfost
265 U. S. 165, 76 L. Ed. 1038

in which it was held that a state license tax on the generation of electricity does not, as laid upon electricity generated for transmission to consumers in another state, impose an unconstitutional burden on interstate commerce. The Supreme Court of the United States held that the act of generation was a local act subject to state taxation and control.

States and cities are prohibited by the Commerce Clause of the Federal Constitution from levying any tax which discriminates against or unduly burdens interstate commerce. But this rule does not automatically free an interstate business from municipal levies. The Supreme Court of the United States made this clear again in

Braniff Airways v. Nebraska State Board
347 U. S. 590, 98 L. Ed. 967

when it said:

> "We have frequently reiterated that the Commerce Clause does not immunize interstate instrumentalities from all state taxation, but that such commerce may be required to pay a non-discriminatory share of the tax burden."

See also

McGoldrick v. Berwind-White Coal Mining Company
309 U. S. 33, 84 L. Ed. 565.

Admittedly, the taxes imposed upon the cameramen and the salesmen apply equally to all engaged in such activities without regard to whether the persons taxed are resident or non-resident so that there can be no question of discrimination against interstate commerce. There is no showing that the plaintiff or its business is unduly burdened by the respective license taxes. The fact that the plaintiff does business in other cities in Florida and might be sub-

ject to similar license taxes in those other cities is immaterial, for the local business or activity transacted in the City of Tallahassee and taxed by the City of Tallahassee cannot be subjected to a tax by any other city whether within or without the State of Florida.

It is, therefore, upon consideration thereof: — ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the temporary restraining order heretofore entered by the Court on the 25th day of April, A. D. 1952, be, and the same is hereby dissolved.

2. That said cause be, and the same is hereby dismissed at the cost of the plaintiff.

3. That the Court retain jurisdiction of the cause for the purpose of hearing any evidence of and the assessment of damages, if any, to which the defendant may be entitled by reason of the issuance of the said temporary restraining order.

ORDERED, ADJUDGED AND DECREED in Chambers at Tallahassee, Leon County, Florida, this 9th day of August, A. D. 1956.

W. May Walker
CIRCUIT JUDGE

APPENDIX B

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1958

OLAN MILLS INCORPORATED,

Appellant,

vs.

CITY OF TALLAHASSEE, a municipal corporation organized under the State laws of Florida,

Appellee

CASE NO. 28,976

Opinion filed January 22, 1958

An Appeal from the Circuit Court for Leon County, W. May Walker, Judge

J. M. & H. P. Sapp, for Appellant

Messer & Willis, for Appellee

HOBSON, J.

This is the third time that Olan Mills, Incorporated, has had occasion to appeal to this court from a circuit court decision involving the validity of municipal license taxes. See *Olan Mills v. City of Tallahassee*, Fla. 43 So. 2d. 521, and *Olan Mills v. Panama City*, Fla., 78 So. 2d 561. Appellant's method of doing business has not changed since these cases were decided. It still sends out solicitors for photographic work and later sends a photographer to take pictures, which are developed, and all contracts pertaining

thereto entered, beyond the borders of the state. We held in Olan Mills, Inc. v. City of Tallahassee, supra, 43 So. 2d 521, that this process is interstate commerce exclusively, that each of the operations involved constitutes an inseparable link in the chain of events, and that there is no separate and distinct incident upon which the tax could fall. In so holding, we relied upon *Nippert v. City of Richmond*, 327 U.S. 416, 66 S.Ct. 586, 90 L. Ed. 760, and *Graves v. City of Gainesville*, 78 Ga. App. 186, 51 S.E. 2d 58.

Pertinent sections of the Tallahassee ordinance which Olan Mills attacks in the instant case are as follows:

> "The amount of occupational license taxes levied and imposed upon every person that shall engage in or manage any business, profession, privilege or occupation hereinafter mentioned within the city is hereby fixed, graded, determined and imposed at the following rates or amounts:
>
> . . . . . .
>
> "PHOTOGRAPHERS OR CAMERAMAN, whether resident, non-resident, transient or itinerant, or those taking photographs by exposure or engaged in portrait enlarging, copying, coloring or finishing, or ferotypers and crayon artists 25.00
>
> "In addition to the license hereinabove provided for there is hereby levied and imposed upon every person engaged in the occupation of a salesman or solicitor for any photographer, cameraman or other person engaged in the business of portrait enlarging, copying, coloring or finishing, ferotyper or crayon artist, whether such salesman or solicitor be resident, non-resident, transient or itinerant and who solicits orders from the general public for the taking of photographs or exposures therefor,

> the enlargement, copying, coloring or finishing of portraits or crayon sketches through the sale of coupons, tokens or other similar device for a valuable consideration or for which an advance deposit of money is paid or delivered to such salesman or solicitor, an occupational license fee of fifteen dollars per annum, or any fraction thereof, that such salesman or solicitor shall engage in such activity within the city. Such license shall not be transferrable."

The city contends that the tax sought to be imposed by this ordinance falls upon local activity and should be upheld as non-discriminatory. The case most nearly in point relied upon by the city is *Lucas v. Charlotte*, 4 Cir., 86 F. 2d 394. That case, however, was urged upon us in *Olan Mills v. City of Tallahassee*, supra, 43 So. 2d 521, and we rejected it as inconsistent with *Nippert v. City of Richmond*, supra.

Since the *Nippert* case was decided the Supreme Court of the United States has squarely held that any direct tax upon the privilege of carrying on a business exclusively interstate in character is invalid as violating the commerce clause, and that this is true no matter how fairly the tax is apportioned to business done within the state. *Spector Motor Service v. O'Connor*, 340 U.S. 602, 71 S. Ct. 508, 95 L. Ed. 573. The same rule was adhered to in the recent case of *Railway Express Agency, Inc. v. Virginia*, 347 U. S. 359, 74 S. Ct. 558, 98 L. Ed. 757.

In *Memphis Steam Laundry Cleaners, Inc. v. Stone*, 342 U.S. 389, 72 S. Ct. 424, 96 L. Ed. 436, the Supreme Court considered a Mississippi tax upon the privilege of soliciting business for laundries not licensed in the state. In holding the tax invalid, the court stated in part:

"If the Mississippi tax is imposed upon the privilege of soliciting inter-state business, the tax stands on no better footing that a tax upon the privilege of doing interstate business. A tax so imposed cannot stand under the Commerce Clause. Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602, 608, 609 95 L. ed. 573, 578, 579, 71 S. Ct. 508 (1951) and cases cited therein."

As we interpret the foregoing decisions of the Supreme Court, interstate commerce can be made subject to a license or privilege tax by the state only where there is a separable intrastate incident to which the tax can attach. And only in such case can the further determination, of whether the tax is discriminatory or non-discriminatory, be made, the tax being supportable only if it fits the latter category. It is true that in connection with appellant's two previous appearances here we have dealt with a discriminatory tax. But it is also true that we have twice been unable to separate from the interstate process, agreeably to the authorities, a taxable intrastate incident. The tax in the present case therefore does not survive the first pitfall which higher authority has provided.

The Supreme Court of Virginia has recently had occasion to consider the identical problems here presented in connection with the same photograph organization and the identical method of doing business. In *Commonwealth v. Olan Mills,* Inc., 196 Va. 898, 86 S.E. 2d 27, (1955), the court struck down the license tax sought to be imposed. The pronouncements of the Supreme Court of the United States are reviewed in the opinion, and it is also noted that of the state courts which have had occasion to consider the question, the decided majority has held that the acts of the solicitor, the cameraman, or both, were integral parts of interstate commerce. The court goes on to state:

> "We have been referred to and have found but three cases which take the other view. We think the holding of the majority is the more logical and in accord with the recent decisions of the Supreme Court, whose views are controlling on this question."

We must hold, as we do, that the ordinance under attack is invalid as to appellant as an attempt to place a direct tax upon the privilege of engaging in interstate commerce.

Reversed.

TERRELL, C. J., THOMAS, THORNAL and O'CONNELL, JJ., concur.

FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1938

No. [redacted] 48

CITY OF TALLAHASSEE, a Municipal Corporation
Organized Under the State Laws of Florida,

Petitioner,

vs.

OLAN MILLS INCORPORATED,

Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for a Writ of Certiorari.

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Olan Mills vs. City of Elizabethton, 269 S. W. (2) 201 (Court of Appeals of Kentucky) 3

Olan Mills vs. City of Maysville, 272 S. W. (2) 460 (Court of Appeals of Kentucky) 3

Olan Mills vs. City of Nicholasville, 280 S. W. (2) 522 (Court of Appeals of Kentucky, 1955) 2

Olan Mills vs. City of Tallahassee, 43 So. (2) 521 (Supreme Court of Florida, 1950) 3

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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 920.

CITY OF TALLAHASSEE, a Municipal Corporation Organized Under the State Laws of Florida,

Petitioner,

vs.

OLAN MILLS INCORPORATED,

Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for a Writ of Certiorari.

STATEMENT OF THE CASE.

The case below was tried on a stipulation of facts as referred to in the petition. The Respondent is Olan Mills Incorporated, a Tennessee corporation, and will be referred to as Olan Mills. Its method of doing business may be summarized as follows:

The Corporation has its principal office and its manufacturing plant in Chattanooga, Tennessee. At that plant photographic film is developed and processed, proofs are manufactured, and the finished photographs, which it sells to the public, are processed and finished.

As the first step in the sales plan, advance salesmen solicit orders for photographs to be manufactured, processed, and finished at the Chattanooga plant. They collect a deposit of fifty cents and arrange for the sitting or exposure.

As the second step, a travelling cameraman takes the picture as previously arranged and collects an additional payment of fifty cents.

As the third step, the exposed film is sent to Chattanooga where negatives are developed and temporary proofs are printed.

As the fourth step, the proofs are mailed to a traveling proof salesman, who presents the same to the customer in order that he may select from the proofs the picture he has purchased and order additional photographs if he so desires.

As the fifth step, the proofs selected are mailed back to Chattanooga where the photographs purchased are manufactured or processed.

Finally, the finished photographs are mailed to the customer in Florida.

Appellate Courts in the following cases, involving Olan Mills or its employees, have held that the method of doing business as described above is interstate in character; that the successive steps are integrated parts of the sales plan; and that states and municipalities cannot levy license or occupational taxes against Olan Mills or its employees.

Commonwealth of Virginia vs. Olan Mills Incorporated, et al., 86 S. E. (2) 27; 196 Va. 898 (Supreme Court of Appeals of Virginia, 1955);

Olan Mills vs. Panama City, 78 So. (2) 561 (Supreme Court of Florida, 1955);

Olan Mills vs. City of Nicholasville, 280 S. W. (2) 522 (Court of Appeals of Kentucky, 1955);

Olan Mills vs. City of Cape Girardeau, 272 S. W. (2) 244 (Supreme Court of Missouri, 1954);

Olan Mills vs. City of Elizabethton, 269 S. W. (2) 201 (Court of Appeals of Kentucky);

Olan Mills vs. City of Maysville, 272 S. W. (2) 460 (Court of Appeals of Kentucky);

Cordell (Olan Mills employee) *vs. Commonwealth of Kentucky*, 254 S. W. (2) 484 (Court of Appeals of Kentucky, 1954);

Bossert (Olan Mills employee) *vs. City of Okmulgee*, 260 P. (2) 429 (Criminal Court of Appeals of Oklahoma, 1953);

North Carolina vs. Jessie Mobley (Olan Mills employee) 66 S. E. (2) 12; 234 N. C. 55 (Supreme Court of North Carolina, 1951);

Nicholson, et al. (Olan Mills employees) *vs. Forrest City*, 216 Ark. 808, 228 S. W. (2) 53 (Supreme Court of Arkansas, 1950);

Olan Mills vs. City of Tallahassee, 43 So. (2) 521 (Supreme Court of Florida, 1950);

Graves (Olan Mills employee) *vs. City of Gainesville*, 78 Ga. App. 186, 51 S. E. (2) 58 (Court of Appeals of Georgia, 1948).

QUESTIONS PRESENTED.

The questions presented by the petition have been decided by applicable decisions of this Court.

Question One.

Both cameramen and solicitors perform acts that are integral parts of interstate commerce. Such local incidents cannot be taxed.

Nippert vs. City of Richmond, 327 U. S. 416, 90 L. ed. 760, 66 S. Ct. 586;

Memphis Steam Laundry & Cleaners, Inc. vs. Stone, 342 U. S. 389, 72 S. Ct. 424;

Michigan-Wisconsin Pipeline Company vs. Calvert, et al.;

Panhandle Eastern Pipeline Company vs. Calvert, et al., 347 U. S. 157, 74 S. Ct. 396;

Railway Express Agency, Inc. vs. Commonwealth of Virginia, 347 U. S. 359, 74 S. Ct. 558.

We quote from *Nippert vs. City of Richmond*, cited above:

"* * * If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the states and necessarily involved 'incidents' occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local' and thus achieve its desired result.

It has not yet been decided that every State tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of the tax."

Question Two.

A municipal occupational license tax although levied indiscriminately upon intrastate and interstate commerce is nevertheless invalid if it bears directly on interstate commerce.

Spector Motor Service, Inc. vs. O'Conner, 340 U. S. 602, 71 S. Ct. 508.

CASES CITED IN PETITION.

The cases cited in the petition are not applicable for the following reasons:

Oliver Iron Mining Company vs. Lord, 262 U. S. 172. This was a tax on the business of mining iron ore.

Utah Power and Light Company vs. Pfost, 286 U. S. 165. The Court held that the generation of electrical power was comparable to the manufacture of goods and subject to an occupational tax.

Coverdale vs. Arkansas-Louisiana Pipe Line Company, 303 U. S. 604. The production of mechanical power to increase the pressure on a pipe line was held to be subject to local taxation.

McGoldrick vs. Berwind-White Coal Mining Company, 309 U. S. 33. A tax in the nature of a sales or use tax can be levied on goods from out of state.

Caskey Baking Company vs. Virginia, 313 U. S. 117. A sale and delivery from stock brought into the state is not a sale in interstate commerce.

Interstate Oil Pipe Line Company vs. Stone, 337 U. S. 662. The Court approved the tax on the ground that the operation of the pipe line was wholly within the state. A strong dissent was made by four members of the Court and the decision was not followed in other pipeline cases heretofore cited in this brief.

Memphis Natural Gas Company vs. Stone, 335 U. S. 80. A franchise or excise tax on a portion of a pipe line lying in Mississippi was upheld. We submit that the dissenting opinion concurred in by four members of the Court expresses the better rule.

Braniff Airways vs. Nebraska State Board, 347 U. S. 590. This was an ad valorem tax on personal property.

Western Live Stock vs. Bureau of Revenue, 303 U. S. 250. The Court held that the business of preparing, printing and publishing a magazine constitutes doing business in the state.

ADVERSE DECISIONS.

The following cases were decided adversely to the contentions of Respondent as set out in this brief.

Lucas vs. City of Charlotte, 86 Fed. (2) 394.
Craig vs. Olan Mills, 203 Miss. 692, 33 So. (2) 801.
Graves vs. State of Alabama, 62 So. (2) 446.

The holdings of the Mississippi and Alabama Courts were based on the *Lucas* case which the other State Courts, in cases involving Olan Mills as cited, have declined to follow. The North Carolina Court points out that the District Court which had dismissed the injunction bill brought by Lucas to enjoin collection of a license fee had rested its decision "* * * in part, at least, on the ground that the plaintiffs had an adequate remedy at law, and also that the bill was defective for misjoinder of parties" * * *. "Consequently, in the light of these background facts, it may well be that the Circuit Court in reaching its decision gave only oblique consideration to the interstate commerce phase of the case. Also, in the cited *Lucas* case, it appears that the facts in respect to the details of the out-of-state processing and finishing work

may not have been developed before the Court so as to show, as in the instant case, the importance of these phases of the picturemaking business." *North Carolina vs. Mobley*, 66 S. E. (2) 12; 234 N. C. 55.

The Court of Appeals did not have the benefit of this Court's opinion in *Nippert vs. City of Richmond* when the *Lucas* case was decided and the determinative point in that case concerned the amount required for Federal Jurisdiction.

CONCLUSION.

For the reasons given, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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